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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-479

STANLEY D. EDMONDS,

Petitioner,

COMPAGNIE GENERALE TRANSATLANTIQUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, AS AMICUS CURIAE

PAUL S. EDELMAN
99 Park Avenue
New York, New York 10016
(212) 687-8181
Attorney for Amicus Curiae and Chief Counsel

Of Counsel:

ARTHUR ABARBANEL
Chairman, Admiralty Section of Amicus Curiae
350 Fifth Avenue
New York, New York 10001

BERNARD M. GOLDSTEIN
222 St. Paul at Saratoga Street
Suite 3103
Baltimore, Maryland 21202

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Statement of Interest of the Amicus Curiae

The Association of Trial Lawyers of America is the successor to the American Trial Lawyers Association, a national bar association, consisting of more than 25,000 lawyers, primarily engaged in the practice of personal injury law and compensation law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are en-

gaged in an especially hazardous industry, recognized as having a special status both by legislation and generally in the courts of the land. All of the maritime workers, not members of the crew of vessels, have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortious series of cases which have attempted since 1972 to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance not only as to standards of liability, but whether injured parties and relatives of deceased workers will receive the damages to which they have been traditionally entitled. Only a broad interpretation of the Federal Act will protect these employees as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief Amicus Curiae.

Consent to file this brief has been sought from the parties herein, and the consent of petitioner and respondent has been received, as well as the consent of various friends of the Court.

Paul S. Edelman,
of KRIENDLER & KRIENDLER,
99 Park Avenue,
New York, New York 10016.
Former Chairman,
Admiralty Section,
The Association of Trial
Lawyers of America

Argument

This case concerns an interpretation of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act ("The Act"), 33 U.S.C., § 901 *et seq.* Congress explicitly made changes in the 1927 Act and did not explicitly or implicitly change the prior law that a third party was fully liable even though a joint tortfeasor together with an employer, which in all cases (except where the employer was also a shipowner), had only the obligation to pay compensation to an employee. It is the position of Amicus Curiae that there being no explicit change in the Act, and none adverted to in the legislative history, that a third party is fully liable for a plaintiff's damages, less any contributory negligence, and if the employer is immune from suit by the third party by reason of the 1972 changes, the employer has a lien on the recovery (less possibly attorney's fees to the plaintiff's attorney).

The Decisions Below

Contrary to all the other Circuit Courts of Appeal, the Court below, after a determination of the proportionate fault of all actors (including a non-present employer) held that the injured plaintiff could recover from the third party only that percentage of his damages for which the third party was held, rather than his full damages less any contributory negligence. The position of the stevedore-employer and recovery of its lien was left in limbo with the implication that this also was to come out of the plaintiff-employee's truncated recovery.

The result was that the employee was held entitled only to 20% of his damages since he himself was held 10% contributorily negligent and the employer was found 70% at fault, although the latter was never a party to the

proceedings on liability and could not be under the provisions of the Act. In the aftermath of *Edmonds,* the employer has been brought back into litigation in district courts in the Fourth Circuit to determine the amount of the plaintiff's recovery now devoured by the lien.

Terms Used

In this presentation, various terms will be used. A stevedore is an employer of those who basically load and unload ships and are not members of the crew, attached to the ship. The longshoreman is the workman, employed by the stevedore.

The case under discussion involves the rights as among the longshoreman (the injured party), his stevedore employer and the shipowner.

Their rights are now determined by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U.S.C. Application of the Act concerns more than longshoremen since it covers a vast number of maritime workers in other trades, and others besides shipowners may be liable to suit as third parties.

The Shipowner Is Liable in Full as a Joint Tortfeasor

The symmetry of the Act as amended in 1972 keeps some of the elements of the Act as known since 1927 and specifically changed only two elements of the third party action.

Changes involved a withdrawal of the longshoreman's right to sue for unseaworthiness, and the relief given to the employer not to be impleaded by the shipowner or third party on an indemnity claim or a call for contribution.

Preceding the changes in the Act the third party was always liable as a joint tortfeasor for all the damages suffered by the employee (less the employee's comparative negligence), even where the other joint tortfeasor was the employer.

The rule universally applied was the common law rule that joint tortfeasors are those whose torts both contribute to an injury, and that each one is liable for the whole damages. Origins of the rule concerning joint tortfeasors are of course very old.

But as discussed in *Zapico* v. *Bucyrus-Erie Co.,* 579 F.2d 714, decided by the Court of Appeals for the Second Circuit, June 15, 1978, "When two or more persons' torts together cause injury, each is fully liable to the victim. Prosser, Law of Torts § 52, at 314 (4th ed. 1971)."

The common rule was recently expressed by the Court of Appeals of New York, its highest court, in *Graphic Arts Mutual Ins. Co.* v. *Bakers Mutual Ins. Co. of New York,* decided November 2, 1978, N.Y.2d. There the Court had before it a dispute on liability coverage between two insurance policies, but since the accident involved joint tortfeasors, one of which was immune from direct suit due to compensation coverage, the Court stated:

> "It is elementary that injured claimants may still choose which joint tortfeasors to include as defendants in an action and, regardless of the concurrent negligence of others, recover the whole of their damages from any of the particulars sued (see *Kelly* v. *Long Island Lighting Co.*, 31 N.Y.2d 25, 30; 2A Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶ 1401:04; McLaughlin, Practice Commentaries, McKinney's Cons. Laws of New York, Book 7B, CPLR 1404:1, p. 381."

This was the rule prior to the 1972 Amendment and was discussed in legislative hearings. Nothing in the new Act specifically changes this rule of law.

In *Derby* v. *Prewitt,* 12 N.Y.2d 100 (1962), the New York Court of Appeals had before it the effect of a release to a driver where the plaintiff had suffered a separate act of medical malpractice after the initial accident.

The Court said:

> "It is settled that a wrongdoer [i.e., the driver] is liable for all the proximate results of his own tortious act, including (in a case such as the present) the aggravation of the original injury caused by the negligence of the physician. [citing authorities]."

Derby v. *Prewitt* makes it clear that joint tortfeasors act in concert and contribute concurrently to the same wrong. This is differentiated from wrongs such as later malpractice which are "independent and successive." Such a text-book analysis was required to deal with the release issue in the case because, "[t]he ancient common law rule barred recovery against one joint tortfeasor if another had been released from liability", except where (under later law), rights were reserved. A look at the ancient rule indicates how closely identified in interest were joint tortfeasors. *Edmonds* grants the shipowner a partial release without anyone's consent or Congress' intention.

Except where an employer is also a shipowner, the Longshoremen's Compensation Act confers on the employer an immunity from suit by the employee. This was confirmed in the 1972 amendments.

Therefore, the previous law remains: a third party whose negligence is one of two or more concurrent causes of injury is liable for the total injury since by definition the accident would not have occurred without the joint negligence of the parties.

Congress had before it several suggestions as to how to ameliorate the burdens on the employer to undo the inequities of the *Ryan* rule which often required the em-

ployer to pay a full indemnity plus a shipowner's legal fees and expenses.

The Senate Hearings on this bill provide further illumination on the issue (pages 351-392 at 373). Papers submitted by the plaintiffs trial lawyers (David Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association) suggested that the 1927 Act be changed *either* to do away with the right to claim over *or* to a proration of liability between a shipowner and the employer. Obviously the former was accepted and the latter rejected, so that the rule of joint liability remains subject only to the immunity granted by statute.

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.,* 417 U.S. 106 (1974).

In other words, the rule later enunciated in favor of contribution among defending wrongdoers in collision cases under a comparative negligence rule in *U.S.* v. *Reliable Transfer Co.,* 421 U.S. 397 (1975) was a rule considered by Congress in 1972 and rejected in the relationship between the shipowner and employer. But *Reliable Transfer* allowed plaintiff a full recovery while *Edmonds* would deny a full recovery.

Edmonds in the decisions of the Court of Appeals for the Fourth Circuit below thus places burdens on the plaintiff never intended by the legislature when it made third parties liable for "negligence" as known to land law with all the concomitant accoutrements including the liability of a negligent party to pay full damages if it is one of several joint tortfeasors.

The Language of Section 905(b)

Two sentences in this section on third party liability express the key to resolving this case.

"In the event of injury to a person covered under this

Act caused by the negligence of a vessel, then such person, . . . may bring an action against such vessel as a third party . . ."

"If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel."

The second sentence (and a similar sentence referring to ship building or repair services) embodies the intent, as expressed in the Legislative History, that:

"The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed* v. *S.S. Yaka,* 373 U.S. 410 (1963) and *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.*" (Emphasis supplied).

The first sentence of the statute makes the shipowner liable for negligence as understood at common law: it is negligence which includes liability for full damages even though a joint tortfeasor. In the second sentence there is no liability if the negligence is attributable only to stevedoring activities which is a restricted negligence liability because here the compensation act provides immunity to the shipowner-employer. But any negligence of a shipowner-employer occurring from its activities as shipowner and not as stevedore subjects it to the same liability as is imposed by the first sentence on all other shipowners. This is properly pointed out in the dissent in *Edmonds.*

Whether or not the employer is a shipowner, all shipowners are fully liable for any negligence, whatever that percentage of fault.

Although wrongly decided, since its final analysis depends on the *Edmonds* case decision below, the two different roles of the shipowner is illustrated by *In re Allied Towing Corp.,* 580 F.2d 702, decided by the Court of Appeals for the Fourth Circuit on July 18, 1978. In that case, a barge owned by Allied exploded while being repaired by Allied at its dock. Limitation of liability was denied because it was carrying a type of fuel not certified by the Coast Guard; the fuel tanks had not been gas freed and Allied had no system for assuring a gas freed vessel. Allied was held liable for its transgressions as owner, but exonerated to the extent that the injuries were caused in its repair operation. Based on *Edmonds,* the Court remanded the case to apportion these two types of fault and allow recovery only for the percentage attributable to ship negligence.

Inconsistently, the court recognized explicitly in *Allied,* what it failed to recognize in *Edmonds,* i.e., that the second sentence of Sec. 905(b) refers *only* to the situation where the shipowner is also the stevedore. It follows that the second sentence has no relevance here.

Under the proper analysis of the *Allied* case, due to its negligence as shipowner, the employer in that case would be liable for full damages less plaintiff's own percentage of damages and less a lien for compensation payments. Otherwise, as shipowner it would be in a different position from a non-employer shipowner, and such a difference was expressly rejected by Congress. The Committee Reports clearly make the liability the same for ship-type negligence for all shipowners when a longshoreman suffers injury. This same Legislative History indicates that *Reed* v. *Yaka* and *Jackson* v. *Lykes Bros. Steamship Co.,* live on, except for a withdrawal of the employee's sea-worthiness remedy and so long as it is ship negligence and not stevedore negligence which causes injury.

That the employer which is also a shipowner is a two-headed beast is also indicated by the well reasoned opinion in *Griffith* v. *Wheeling Pittsburgh Steel Corp.,* 521 F.2d 31 (3rd Cir. 1975), cert. den. There it is clearly pointed out that such an employer has two different liabilities, one as an owner and operator of a vessel, and one as a stevedore company which in the latter case has liability only for compensation. As the owner is a joint tortfeasor, he is liable for all the damages unless the other tortfeasor is not immune from suit, for in that event the damages are paid proportionate to fault.

Limitation of the shipowner's duty to pay full damages places a financial burden on the employee not provided by the Act.

A review of the Legislative History betokens a great deal of solicitude for an injured employee. Inequities for a shipowner and employer were also dealt with.

Nowhere, however, is there the least suggestion that a shipowner should pay only its percentage of fault or is there any suggestion that an employer pay anything more

than compensation and fail to recover its lien out of the third party suit recovery if successful. Any of these results would be a radical departure from previous law and there is no authority in the Legislative History to suggest that an employee-plaintiff receive anything less than a full recovery, less his own negligence and less a repayment of his lien (with a possible payment by the lienor for attorneys' fees).

The Legislative History does not explicitly discuss the rules to be adopted where the negligence of both vessel and stevedore contribute to the injury and deals only with what happens if the employee is contributorily negligent.

It would therefore be obvious, given the airing of the problem from all points of view that the prior law is in no way affected on this point except as explicitly set forth in the statute, i.e., no impleader over against an employer.

Under this analysis the ship may be fully liable for negligence as it always was, and the stevedore employer liable only for compensation which is the obvious intent of the amendment.

There would be no justice in interpreting § 905 to hold that the ship escapes all liability if the stevedore is also negligent and thus to relegate the injured employee only to compensation and not the damages always available against a third party in our legal system. A shipowner would escape on the least showing of stevedore negligence which would result in a clear disincentive to have a safe ship.

The same logic dictates that the Act does not reduce an innocent longshoreman's recovery against a negligent shipowner just because of concurring negligence of the stevedore employer over whom the employee has no control. To reduce the longshoreman's recovery is to resur-

rect the defense of assumption of risk contrary to the stated intent of Congress.

In the House and Senate report the example of shipowner negligence is given of a longshoreman slipping on oil. The shipowner is liable if it knew it was there, or if the oil was there long enough so it should have been discovered, i.e., constructive notice. Or, of course, if the shipowner put the foreign substance on the deck. By saying thereafter that the vessel is not chargeable with the negligence of the stevedore, the reports indicate that the shipowner is liable only where its own negligence is proven, nothing being said that as a joint tortfeasor the owner should pay anything less than full damages less contributory negligence.

If the law is to be analogized to "land-based" law, and using "accepted principles of tort law", then to adopt the rule of the Court below would be a clear innovation completely foreign to the law which prevailed before, or which prevails generally throughout the country. Reasoning in the *Edmonds* case which does not follow any common law rule, was rightly rejected either explicitly or implicitly in all the other circuit courts considering the issue. *Samuels* v. *Empresa Lineas Maritimas Argentinas* (5th Cir. 1978) 573 F.2d 884.

The rationale is perhaps best set forth in the Ninth Circuit Court's decision in *Dodge* v. *Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669 (1975), cert. den., 425 U.S. 944 (1976) and *Shellman* v. *U.S. Lines,* 528 F.2d 675 (1975), cert. den., 425 U.S. 936. A similar conclusion was reached in dicta by the Second Circuit in *Landon* v. *Lief Hoegh & Co.* (1975), 521 F.2d 756, cert. den., 423 U.S. 1053 (1976), and specifically by a footnote which was originally footnote 10 of the opinion which was withdrawn by consent of the parties before the opinion was published.

The Third Circuit has discussed the issue and seems inclined to support the majority of the other Circuits. *Marant* v. *Farrell Lines, Inc.* (1977) 550 F.2d 142.

As stated in the *Samuels* opinion:

> "If there is a further adjustment to be made when the vessel's common law negligence is concurrent with the plaintiff's employer's negligence, the decision is for the Congress. . . . To permit the employer's negligence to reduce the joint tortfeasor vessel's liability would reduce the award of the plaintiff, the one person who is blameless. [editorial note: if he is to blame his recovery is thereby reduced]. The innocent victim of concurrent negligence would find that, through some (to him inscrutable) judicial attempt to achieve equity for other parties, he must accept a partial loaf of compensation for the full loaf of joint and several liability."

See also: *Pastorello* v. *Koninklijke Nederl. Stoomb. Maats B.V.* (E.D.N.Y. 1978), 456 F.Supp. 882.

In the 1972 Act, Congress reached a result quite different from the original bill submitted by the Department of Labor, then S.525. Originally, the bill intended to equate a shipowner with an employer and deprive longshoremen of all third party rights, limiting them solely to compensation. Similar bills were under consideration in the 1950's and 1960's.

Since this was never enacted, it is clear that in furtherance of the need to keep ship conditions reasonably safe, the shipowner was to keep his full liability for acts of his own negligence and was in no way to share the employer-stevedore's immunity from suit or to acquire any new partial immunity.

The essence of the joint responsibility of the shipowner and employer with the liability for damages fixed on the

shipowner is explained and made effective in many Circuit Court decisions. Such well-reasoned opinions are exemplified by:

Lubrano v. *Royal Netherlands Steamship Co.*, 572 F.2d 364 (2nd Cir. 1978) (absence of dunnage where evidence showed ship's officer approved and joined in direction for longshoremen to continue work; jury question; joint liability referred to in footnote 4).

Canizzo v. *Farrell Lines, Inc.*, 579 F.2d 682 (2nd Cir. 1978) (grease partially covered by pile of wires placed on deck by crew).

Napoli v. *Hellenic Lines, Ltd.*, 536 F.2d 505 (2nd Cir. 1976) (liability may be predicated on an obvious danger which the shipowner should reasonably anticipate that the longshoreman would be unable to avoid).

Where the stevedore is not protected by the Act, it may be required to contribute to the plaintiff's damages or even bear the entire loss by indemnification. In *Pastore* v. *Taiyo Gyogyo K.K.*, 571 F.2d 777 (3rd Cir. 1978) a city fireman was injured by the concurrent negligence of the shipowner which failed to warn of a dangerous condition (deceptively covered cargo providing hazardous support for a ladder from which the fireman fell) and the stevedore which started the fire. The jury held that the stevedore breached a warranty and it was required to indemnify the shipowner. The case is also interesting because the employer was the City of Philadelphia which had immunity from suit; it could not be called on for contribution as a matter of federal law.

Thus, joint tortfeasors are always jointly liable. But if any one has immunity (or, conceivably if one is judgment-proof), all others are jointly and severally liable for the total.

The relationship of the joint tortfeasors must be sorted out between them depending on their relationship and applicable law as to immunity, contribution or indemnity. It should be of no concern to the injured plaintiff who for a variety of reasons may not be able to sue one of the tortfeasors or to collect a judgment against one or more for financial reasons, lack of insurance coverage or lack of financial ability to pay. *Reliable Transfer* should not be misused to reduce a plaintiff's damages.

This is the universal rule except as applied in the Court below which misapplied the provisions of the Act and read into the Legislative History what is not there on examining it as a whole. In espousing a so-called "equitable" rule, the Court below rewards a negligent shipowner and penalizes an injured longshoreman. The comparative negligence rule, meant to protect the plaintiff in a hazardous maritime employment was used below to take away the protections which the Act meant to preserve for all longshoremen and harbor workers.

Conclusion

This Court should promulgate a uniform rule consistent with recognized law prevailing throughout the country that a joint tortfeasor is jointly and severally liable. Under the Act an injured employee recovers his full damages against a negligent third party less any contributory negligence. His employer recovers its lien and has no further liability unless it is negligent as a shipowner (which is not this case). Any other rule emasculates the third party ac-

tion for the one person for whom the maritime law and the Act were meant to secure a just recovery.

Respectfully submitted,

PAUL S. EDELMAN
99 Park Avenue
New York, New York 10016
(212) 687-8181
Attorney for Amicus Curiae and Chief Counsel

Of Counsel:

ARTHUR ABARBANEL
Chairman, Admiralty Section of Amicus Curiae
350 Fifth Avenue
New York, New York 10001

BERNARD M. GOLDSTEIN
222 St. Paul at Saratoga Street
Suite 3103
Baltimore, Maryland 21202

December 18, 1978

Certificate

This is to certify that on the day of December, 1978, copies of this brief were served on:

C. Arthur Rutter, Esq.
Breit, Rutter & Montagna
720 Atlantic National Bank Building
415 St. Paul's Boulevard
Norfolk, Virginia 23510
Attorneys for Petitioner

Charles F. Tucker, Esq.
Vandeventer, Black, Meredith & Martin
1 Commercial Place
Norfolk, Virginia 23510
Attorneys for Respondent

David R. Owen, Esq.
Semmes, Bowen & Semmes
10 Light Street
Baltimore, Maryland 21202
Attorneys for Amicus

Thomas D. Wilcox, Esq.
919 Eighteenth Street, N.W.
Washington, D. C. 20006
Attorney for Amicus

Randall C. Coleman, Esq.
Ober, Grimes & Shriver
1600 Maryland National Bank Bldg.
Baltimore, Maryland 21202
Attorneys for Amicus

Graydon S. Staring, Esq.
2 Embarcadero Center
San Francisco, California 94111
Attorney for Amicus

.....
Paul S. Edelman

(63870)